

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

First Named

Inventor : David S. Majkrzak

Appln. No.: 10/772,122

Filed : February 4, 2004

For : HIGH CAPACITY SICKLE SECTION

Docket No.: C136.12-0016

Appeal No. _____

Group Art Unit: 3671

Examiner: Torres, Alicia M.

RESUBMITTED BRIEF FOR APPELLANT

FILED ELECTRONICALLY

July 30, 2008

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450
Sir:

This is responsive a Notice of Non-Compliant Appeal Brief mailed on July 22, 2008. Applicant inadvertently did not include Exhibits A and B from the October 1, 2007 Amendment, which are now attached. Appellant has also amended the Argument section to clarify that Exhibits A and B are from the October 1, 2007 Amendment.

REAL PARTY IN INTEREST

Crary Corporation, a corporation organized under the laws of the state of Illinois, and having offices at 237 Northwest 12th Street, West Fargo, ND 58078, has acquired the entire right, title and interest in and to the invention, the application, and any and all patents to be obtained therefor, as set forth in the Assignment filed with the patent application and recorded on Reel 014966, frame 0737.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

STATUS OF THE CLAIMS

- I. Total number of claims in the application.
- Claims in the application are: 1-16
- II. Status of all the claims.
- A. Claims cancelled: 3 and 6-15
- B. Claims withdrawn but not cancelled: None
- C. Claims pending: 1, 2, 4, 5 and 16
- D. Claims allowed: None
- E. Claims rejected: 1, 2, 4, 5 and 16
- F. Claims Objected to: None
- III. Claims on appeal
- The claims on appeal are: 1, 2, 4, 5 and 16

STATUS OF AMENDMENTS

No amendment was filed subsequent to the final rejection.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention claimed in claim 1 includes a knife section 15 for mounting on a reciprocating sickle bar 12 for a harvester and reciprocating during use across an edge of a stationary sickle guard 11 (3:10-22, FIG. 1). The knife section is flat and has a top surface plane. The knife section 15 has a base 19 with a laterally extending base edge 35 and a leading end 28 spaced from the base edge 35 (FIGS. 4 and 5). The knife section 15 has mounting holes in the base 19 for securing the knife section 15 to a sickle bar 12 (3:19 – 4:7, FIGS. 1, 2, 4 and 5). The knife section 15 has a central dividing plane perpendicular to the top surface plane 19 of the knife section 15 and bisecting the top surface plane 19 between the base 35 and leading end 28 (FIGS. 4 and 5). The knife section has side edges 36 parallel to the central dividing plane where the side edges 30 of the base 19 have a length of between 40% and 50% of a distance from the base edge 35 to the leading end 28 (5:13-15, 7:21-24, FIGS. 4 and 5). The leading end 20 is of substantially less lateral width perpendicularly to the center dividing plane than a width between the side edges 30 of the base 19, as defined by the base edge 35 (FIGS. 4 and 5). The knife section 15 has a pair of cutting edges 26, one on each side of the knife section 15 where each cutting edge 26 defines a cutting line that continually moves away from the center plane of the knife section 15 from a first end 32 of such cutting line adjacent the leading end 28 to a second end of the cutting line at a junction of the cutting line with a respective side edge on the respective side of the base of the knife section (4:21-26, 7:10-16, FIGS. 4 and 5). Each cutting line 26 is concave with respect to a straight line between the first and second ends 32 of the respective cutting line about 14% of the length of the straight line, such that the opening between adjacent knife sections 15 placed edge to edge on a sickle bar 12 results in increased feed area for crop material that is cut with each reciprocation of the knife section when installed on a sickle bar 12 (5:12-22, FIGS. 1, 2, 4 and 5).

The invention claimed in claims 16 is a knife section 15 for mounting on a reciprocating sickle bar 12 for a harvester and reciprocating during use across an edge of a stationary sickle guard 11 (3:10-22, FIG. 1). The knife section 15 comprises a substantially flat top surface and a

substantially flat bottom surface being substantially parallel to the substantially flat top surface (FIGS. 2, 4 and 5). The knife section 15 has a base edge 35 and a leading end 28 opposite the base edge 35 (4:10-21, FIGS. 2, 4 and 5). The knife section 15 has a left side edge 30 extending from the base edge 37 about one half of a distance between the base edge 35 and the leading end 28 and a right side edge 30 extending from an opposite side of the base edge 35 about one half of the distance between the base edge 35 and the leading end 28 (5:13-15, 7:21-24, FIGS. 4 and 5). The knife section 15 has an arcuate left cutting edge 26 extending between the left side edge 30 and the leading end 28, wherein the left cutting edge 26 comprises a left serrated cutting edge 26 and an arcuate right cutting edge 26 extending between the right edge 36 and the leading end 28, wherein the right cutting edge 28 comprises a right serrated cutting edge 26 and wherein a distance between the left cutting edge 26 and the right cutting edge 26 continually increases from the leading end 28 to the left and right side edges 30, wherein the arcuate cutting edges 26 are of a configuration that defines a portion of a substantially elliptical cutting edge 26 when a left side edge 30 of one knife section 15 is positioned substantially adjacent to a right side edge 30 of another knife section 15 (3:10 – 5:4, FIGS. 1, 3, 4 and 5).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

- I. Whether claim 16 is made obvious under 35 U.S.C. § 103(a) by the combination of the Poget patent in view of Isbell U.S. Patent No. 4,380,889 (hereinafter the Isbell patent).
- II. Whether claims 1, 2, 4 and 5 were properly rejected under 35 U.S.C. § 112, first paragraph, as including new matter.

ARGUMENT

I. The Office Action Erred in Rejecting Claim 16 as being Obvious over the Combination of the Poget Patent in view of the Isbell Patent.

The Office Action erroneously rejected claim 16 under 35 USC § 103(a) as being unpatentable over the Poget Patent in view of the Isbell patent. The Office Action alleges that the Poget patent discloses a knife section comprising a flat top and bottom surface, a base end, a leading end opposite the base edge, a left side including an edge extending from the base edge to about one half of a distance between the base edge and leading end, and an arcuate left cutting edge extending between the left side edge and the leading end. The Office Action also alleges that the Poget patent discloses a right side including an edge extending from the base edge to about one half of a distance between the base edge and leading end and an arcuate right cutting edge extending between the left side edge and the leading end. The Office Action alleges that the Poget patent discloses a distance between the left cutting edge and the right cutting edge continually increases from the leading end to the left and rights side edges, wherein the arcuate cutting edges define portions of a substantially elliptical cutting edge when a left side edge of one knife section is positioned substantially adjacent to a right side edge of another knife edge.

Applicant respectfully disagrees that when the sickle sections disclosed in the Poget patent are aligned one next to each other that the cutting edges define a substantially elliptical cutting edge. Applicant has photocopied the drawings of sickle sections disclosed in the Poget patent and positioned three sickle section figures adjacent to each other, which is attached hereto as Exhibit A which was previously entered in an Amendment filed on October 1, 2007. The sickle sections disclosed in the Poget patent define a substantially V-shape cutting edge.

In contrast, Applicant has also photocopied the sickle sections illustrated in Figure 4 of the application and positioned three sickle section figures side by side which is attached hereto as Exhibit B which was previously entered in an Amendment filed on October 1, 2007. The cutting edge of the three side by side sickle sections provide substantially elliptical cutting as claimed. The V-shaped cutting edge is not a substantially elliptical cutting edge as claimed.

Further, there is no suggestion in the Poget patent of increasing the arc of the cutting edge to make the cutting edge substantially elliptical when two sickle sections are positioned adjacent each other. Therefore, the Poget patent in view of the Isbell patent does not make independent claim 16 obvious. Reversal of the rejection of claim 16 is respectfully requested.

II. The Office Action Erroneously Rejected Claim 1, 2, 4 and 5 as Containing New Matter.

The Office Action erroneously rejected claims 1, 2, 4 and 5 under 35 USC § 112, first paragraph, as failing to comply with the written description requirement. The Office Action states that claim 1 requires that each cutting line be concave with respect to a straight line between a first and second ends of the respective cutting line being about 14% of the length of the straight line. The Office Action states that this structural limitation, specifically the ratio of about 14%, was not included in the original set of claims, instead it was added in the amendment filed February 6, 2006. The Office Action states that the ratio was not included in the originally filed Specification and was instead added in the amendment of February 6, 2006 and therefore, the ratio constitutes new matter.

The Office Action refers to the *Hockerson-Halberstadt, Inc. v. Avia Group Int'l.* 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000). The Office Action alleges that the *Hockerson* patent concluded that it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.

Applicant respectfully submits that the ratio of about 14% was present in the Figures as originally filed and therefore is not new matter. An applicant shows possession of the claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, **figures**, diagrams and formulas that fully set forth the claimed invention. *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572, 41 USPQ2d 1961, 1966 (Fed. Cir. 1997). (Emphasis added). Compliance with the written description requirement is a question of fact which must be resolved on a case-by-case basis. *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563, 19 USPQ2d 1111, 1116 (Fed. Cir. 1991).

Applicant submitted Figures 1-5 in the application as filed. Figures 1-5 prove that Applicant had possession of the subject matter illustrated in the drawings as of the filing date. The drawings show the "about 14%" relationship that was disclosed in the application filed as Applicant did not alter the curve in the drawings with the Amendment of February 6, 2006. Rather, Applicant provided a description of the shape of the curved surface by drawing a line between the ends of the curve and drawing a perpendicular line between the curve and the line. This ratio is another description of a curved surface that was graphically depicted in the Figures as filed. Therefore, the inclusion of term "about 14%" was disclosed in the original specification. As such, the "about 14%" is not new matter because Applicant had possession of the claimed subject matter and graphically described the cutting edge at the time the application was filed.

Regarding *Hockerson*, the case stands for the proposition of what is prior art and what is disclaimed matter. The *Hockerson* case did not mention whether or not an amendment made to a claim was new matter or not. Rather, *Hockerson* related to the scope of a drawing in the prior art and the statements made to overcome the rejection based upon the prior art.

Applicant respectfully submits that the Office Action is confusing the issue of what is new matter with the issue of what a drawing discloses as prior art. For instance, the heading of MPEP §2125, upon which the Office Action is relying, is "Drawings as Prior Art." There is a difference between the disclosure of drawings as a prior art reference and what is new matter in an application because Applicant's figures are subject to the best mode requirement of 35 U.S.C. § 112, first paragraph.

"The best mode requirement creates a statutory bargained-for-exchange by which a patentee obtains the right to exclude others from practicing the claimed invention for a certain time period, and the public receives knowledge of the preferred embodiments for practicing the claimed invention." *Eli Lilly & Co. v. Barr Laboratories Inc.*, 251 F.3d 955, 963, 58 USPQ2d 1865, 1874 (Fed. Cir. 2001). The best mode requirement is a safeguard against the desire on the part of some people to obtain patent protection without making a full disclosure as required by the statute. The requirement does not permit inventors to disclose only what they know to be

their second-best embodiment, while retaining the best for themselves. *In re Nelson*, 280 F.2d 172, 126 USPQ 242 (CCPA 1960).

Applicant was required to provide the curved cutting edge as it showed the public how to produce a high capacity knife section for a sickle. Therefore, the fact that Applicant did not state that the Figures were drawn to scale is not determinative whether or not the “about 14%” is new matter because Applicant in order to satisfy the best mode requirement had to provide the drawings with a cutting edge having the claimed curved cutting edge.

As such Applicant submits that the Office Action erred in rejecting claims 1, 2, 4 and 5 as containing new matter. Applicant respectfully requests that the new matter rejection be reversed.

CONCLUSION

For the forgoing reasons, the present application is in allowable form. Reversal of the rejections of claims 1, 2, 4, 5 and 16 are respectfully requested.

Respectfully submitted,

WESTMAN, CHAMPLIN & KELLY, P.A.

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PJI:mek

Appendix A

CLAIMS INVOLVED IN APPEAL:

1. (Previously Presented) A knife section for mounting on a reciprocating sickle bar for a harvester and reciprocating during use across an edge of a stationary sickle guard, said knife section being flat and having a top surface plane and comprising a base with a laterally extending base edge, the knife section having a leading end spaced from the base edge, mounting holes in the base for securing the knife section to a sickle bar, the knife section having a central dividing plane perpendicular to the top surface plane of the knife section and bisecting the top surface plane between the base and leading end, and the base having side edges parallel to the central dividing plane, the side edges of the base having a length of between 40% and 50% of a distance from the base edge to the leading end, the leading end being of substantially less lateral width perpendicularly to the center dividing plane than a width between the side edges of the base, as defined by the base edge, a pair of cutting edges, one on each side of the knife section and each cutting edge defining a cutting line that continually moves away from the center plane of the knife section from a first end of such cutting line adjacent the leading end to a second end of the cutting line at a junction of the cutting line with a respective side edge on the respective side of the base of the knife section, and each cutting line being concave with respect to a straight line between the first and second ends of the respective cutting line being about 14% of the length of the straight line, such that the opening between adjacent knife sections placed edge to edge on a sickle bar results in increased feed area for crop material that is cut with each reciprocation of the knife section when installed on a sickle bar.
2. (Original) The knife section of claim 1, wherein said leading end has a surface transverse to the central plane of the knife section.
3. (cancelled)

4 (Previously Presented) The knife section of claim 1, wherein said cutting line is part of a circle and the line moves away from the center plane at a substantially greater rate for each increment of distance in direction from the leading end to the base along the cutting plane adjacent to the base than at the leading end.

5. (Previously Presented) The knife section of claim 1, wherein each cutting edge is serrated, with outer serration points lying along the respective cutting line.

6 – 15 (Cancelled)

16. (Currently Amended) A knife section for mounting on a reciprocating sickle bar for a harvester and reciprocating during use across an edge of a stationary sickle guard, the knife section comprising:

- a substantially flat top surface;

- a substantially flat bottom surface being substantially parallel to the substantially flat top surface;

- a base edge;

- a leading end opposite the base edge;

- a left side edge extending from the base edge about one half of a distance between the base edge and the leading end;

- a right side edge extending from an opposite side of the base edge about one half of the distance between the base edge and the leading end;

- an arcuate left cutting edge extending between the left side edge and the leading end, wherein the left cutting edge comprises a left serrated cutting edge; and

- an arcuate right cutting edge extending between the right edge and the leading end, wherein the right cutting edge comprises a right serrated cutting edge and wherein a distance between the left cutting edge and the right cutting edge continually increases from the leading end to the left and right side

edges, wherein the arcuate cutting edges are of a configuration that defines a portion of a substantially elliptical cutting edge when a left side edge of one knife section is positioned substantially adjacent to a right side edge of another knife section.

Appendix B

Evidence Index

Appellant has submitted the Declaration of David S. Majkrzak under 37 C.F.R. § 1.132 on August 24, 2006, a copy of which is attached as Exhibit 1. Appellant has not submitted any evidence under 37 C.F.R. §§ 1.130 or 1.131.

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For : HIGH CAPACITY SICKLE SECTION

Docket No.: C136.12-0016

Group Art Unit: 3671

Examiner: Torres

DECLARATION UNDER 37 C.F.R. § 1.132

I, David Majkrzak, declare as follows:

1. I am the Vice President - Engineering for Crary Company, the assignee of the present patent application, and have first-hand knowledge of the facts contained herein.

2. I am the inventor of the subject matter contained within the present patent application.

3. The present invention relates to a high efficiency sickle section for mounting to a cutting bar that is utilized to harvest crops such as soybeans and small grain including wheat and oats.

4. The unique design of the sickle sections includes concave cutting edges that increase the cutting capacity of the cutting bar relative to a cutting bar having sickle sections with straight cutting edges, due to the increased area between the cutting edges of adjacent sickle sections.

5. The increased capacity of the sickle bar allows the harvester to move more quickly through the field while cutting the stalks of the grain and thereby decrease the amount of time required to harvest the crops.

6. An increasing number of farmers are utilizing minimum tillage or no tillage farming techniques to decrease costs and reduce erosion to their fields by minimizing or altogether ceasing the practice of tilling the ground after a harvest and/or prior to planting the crops.

7. When utilizing a minimum tillage or a no tillage

EXHIBIT

1

farming technique, the current crop is planted through the residue of the prior year's harvested crop.

8. While reducing tillage costs, the residue makes harvesting crops with a sickle bar more difficult due to the presence of upright stalks of residue, having a relatively large diameter, such as a corn stalk.

9. A corn stalk which remains standing from the previous year's harvest typically has sufficiently dried to have a hardness similar to wood which makes cutting the corn stalk difficult with a cutting bar.

10. The issue of standing corn stalks in no tillage or minimum tillage fields of soy beans or small grain during harvest has been made worse with the introduction of genetically modified corn that is resistant to borer insects. The genetically modified corn is commonly referred to as "Biotech Corn" and does not readily degrade which causes more stalks from the previous year's harvest to remain in an upright position. The stalk of the Biotech Corn, when dried through to the next harvest season, has a hardness that is greater than that of a typical corn stalk and is more difficult to cut with the cutting bar.

11. The corn stalks have a tendency to break sickle sections when the sickle section engages and attempts to cut the previous year's corn stalks, which causes down time on the harvester and increases the time required to complete the harvest.

12. The present claimed invention provides for a high capacity sickle section and cutting bar that has a large area between the concave surfaces of the adjacent sickle sections to allow the harvest to be completed more quickly, while providing the structural integrity to withstand contact with the corn stalks in no tillage or minimum tillage fields.

13. Crary Corporation, as a routine matter of business, provides evaluation/feedback forms along with purchased product.

-3-

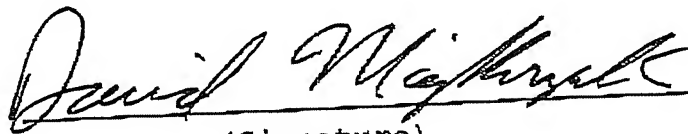
I review the evaluation/feedback forms to determine if the products are meeting the customer's expectations.

14. Attached as Exhibit A is an evaluation/feedback form from a farm implement dealer stating that the "King Kut", the trademark given to the sickle section of the present invention, increased the sales of cutting system products and is the most requested part for cutting systems.

15. Attached as Exhibit B is an evaluation/feedback form from a farmer located in Springfield, Illinois that states that the King Kut product is the only one that he has found that does a good job of cutting no-till beans that were planted in the previous year's corn stalks.

16. Attached as Exhibit C is an evaluation/feedback form from a farmer located in St. Thomas, Ontario, Canada that states that the King Kut system allowed for an increase in cutting speed while lightening the cutting bar and maintaining durability.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting there from, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.



(Signature)

David Majkrzak, Vice President Engineering
(Print or Type Name and Position)

DAVID MAJKRAK VP-ENG

(Date)

AUG 23, 2006

Thank You!

We'd love to hear your feedback
on the Crary product you purchased!

Testimonial

Name: Haron Tractor

Address: _____

City: Exeter State: OH Zip: _____

Phone: _____ Email: _____

Crary Dealer Name and Location: _____

Product(s) Purchased

- | | | | |
|----------------------------------|--|--|---|
| <input type="checkbox"/> AirHead | <input type="checkbox"/> Cyclone | <input type="checkbox"/> Air Reel | <input type="checkbox"/> Header Trailer |
| <input type="checkbox"/> Big Top | <input type="checkbox"/> Crary Wind System (CWS) | <input checked="" type="checkbox"/> Gold'N Cut/KingKut | |

How does Crary help you get your job done more efficiently? The Crary King Kut System Has really ignited our Cutting System Sales. IT is our most asked for part for Cutting System's.

How do you rate the quality and performance on your Crary product? 8/10

Comments/Other: _____

I agree to allow my comments, my name, city and state be published for promotional purposes by TerraMarc Industries:

Signed: _____ Date: 6/13/06



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sales@crary.com • www.crary.com

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Thank You!

We'd love to hear your feedback
on the Crary product you purchased!

[Testimonial]

Name: Tim Makowski

Address: _____

City: Springfield State: IL Zip: _____

Phone: _____ Email: _____

Crary Dealer Name and Location: _____

Product(s) Purchased

- | | | | |
|----------------------------------|--|--|---|
| <input type="checkbox"/> AirHead | <input type="checkbox"/> Cyclone | <input type="checkbox"/> Air Reel | <input type="checkbox"/> Header Trailer |
| <input type="checkbox"/> Big Top | <input type="checkbox"/> Crary Wind System (CWS) | <input checked="" type="checkbox"/> Gold'N Cut/KingKut | |

How does Crary help you get your job done more efficiently? The King Kut Section
is the only product I have found to do
a good job of cutting No-Till Acres in BT Corn stalks

How do you rate the quality and performance on your Crary product? 9/10

Comments/Other: _____

I agree to allow my comments, my name, city and state be published for promotional purposes by TerraMarc Industries:

Signed: _____ Date: 2/16/06



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EXHIBIT

B

Thank You!

We'd love to hear your feedback
on the Crary product you purchased!

[Testimonial]

Name: Mark Richards

Address: _____

City: ST Thomas State: OW Zip: _____

Phone: _____ Email: _____

Crary Dealer Name and Location: _____

Product(s) Purchased

- | | | | |
|----------------------------------|--|--|---|
| <input type="checkbox"/> AirHead | <input type="checkbox"/> Cyclone | <input type="checkbox"/> Air Reel | <input type="checkbox"/> Header Trailer |
| <input type="checkbox"/> Big Top | <input type="checkbox"/> Crary Wind System (CWS) | <input checked="" type="checkbox"/> Gold'N Cut/KingKut | |

How does Crary help you get your job done more efficiently? I was able to increase my cutting speed + lighten up my knife with the KingKut. IT runs great and is durable.

How do you rate the quality and performance on your Crary product? 9/10

Comments/Other: _____

I agree to allow my comments, my name, city and state be published for promotional purposes by TerraMarc Industries:

Signed: _____ Date: 2-9-06



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EXHIBIT

C

Appendix C

Related Proceedings Index

None.

